No. _____

In The
Supreme Court of the United States

STUART FORCE, *et al.*,

Petitioners,

v.

FACEBOOK, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United State Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 230(c)(1) of Title 47 states that no provider of interactive computer service (such as a website) "shall be treated as the publisher of any information provided by another information content provider [such as a user who posts something on the website]." The questions presented are:

(1) Is section 230(c)(1) a limitation on the definition of a publisher under certain other prohibitions, or a broad grant of immunity to covered publishers, and

(2) Is "publisher" in section 230(c)(1) limited to the exercise of traditional editorial functions, such as deciding to accept or reject a submission?

The same questions are presented in *Dyroff v. The Ultimate Software Group*, No. 19-___. The petition in *Dyroff* is being filed simultaneously with the petition in the instant case.

PARTIES

Petitioners are (1) Stuart Force, individually and as Administrator on behalf of the Estate of Taylor Force, Robbi Force, Kristin Ann Force, (2) Abraham Ron Fraenkel, individually and as Administrator on behalf of the Estate of Yaakov Naftali Fraenkel, and as the natural and legal guardian of minor plaintiffs A.H.H.F., A.L.F., N.E.F, N.S.F., and S.R.F., (3) Rachel Devora Sprecher Fraenkel, individually and as Administrator on behalf of the Estate of Yaakov Naftali Fraenkel and as the natural and legal guardian of minor plaintiffs A.H.H.F., A.L.F., N.E.F, N.S.F., and S.R.F., (4) Tzvi Amitay Fraenkel, Shmuel Elimelech Braun, individually and as Administrator on behalf of the Estate of Chaya Zissel Braun, (5) Chana Braun, individually and as Administrator on behalf of the Estate of Chaya Zissel Braun, Shimshon Sam Halperin, Sara Halperin, Murray Braun, Esther Braun, (6) Micah Lakin Avni, individually and as Joint Administrator on behalf of the Estate of Richard Lakin, (7) Maya Lakin, individually and as Joint Administrator on behalf of the Estate of Richard Lakin, (8) Menachem Mendel Rivkin, individually and as the natural and legal guardian of minor plaintiffs S.S.R., M.M.R., R.M.R., S.Z.R., and (9) Bracha Rivkin, individually and as the natural and legal guardian of minor plaintiffs S.S.R., M.M.R., R.M.R., and S.Z.R.

The respondent is Facebook, Inc.

RELATED PROCEEDINGS

Force, et al. v. Facebook, Inc., 934 F.3d 53 (2d Cir. July 31, 2019)

Force, et al. v. Facebook, Inc., 304 F.Supp.3d 315 (E.D.N.Y. Jan. 18, 2018)

Cohen, et al. v. Facebook, Inc., 252 F.Supp.3d 140 (E.D.N.Y. May 18, 2017)

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Petitioners Stuart Force, *et al*., respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on July 31, 2019.

OPINIONS BELOW

The July 31, 2019, opinion of the court of appeals, reported at 934 F.3d 53 (2d Cir. 2019), appears at Appendix pp. 1a-76a. The August 29, 2019, order of the court of appeals denying rehearing and rehearing *en banc*, appears at Appendix pp. 152a-54a. The May 18, 2017, Memorandum and Order of the district court, reported at 252 F.Supp.3d 140 (E.D.N.Y. 2017), appears at Appendix pp. 113a-15a. The January 18, 2018, Memorandum and Order of the district court, reported at 304 F.Supp.3d 315 (E.D.N.Y. 2018), appears at Appendix pp. 78a-112a.

JURISDICTION

The decision of the court of appeals was entered on July 31, 2019. A timely petition for rehearing was denied by the court of appeals on August 29, 2019. On November 14, 2019, Justice Ginsburg extended the time for filing the petition to January 13, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 320(c)(1) of 47 U.S.C. provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The balance of the statute involved is set out in the Appendix.

INTRODUCTION

This petition concerns the most important statute of the Internet age. In 1996, as the growth of the Internet accelerated, Congress adopted the Communications Decency Act. 47 U.S.C. § 230. A single sentence of that statute, what is now section 230(c)(1), has come to determine the basic legal standards governing an enormous number and variety of social media and other internet companies, both giant established firms such as Facebook and Twitter, and a vast array of smaller and constantly emerging companies. 47 U.S.C. § 230(c)(1). "In the two decades since Section 230's passage, th[e] twenty-six words [in section 230(c)(1)] have fundamentally changed American life." Jeff Kosseff, The Twenty-Six Words That Created The Internet, 3 (2019).

Section 230(c)(1) has this vast impact, not by establishing its own regulatory scheme, but by limiting the extent to which many federal, state, and even foreign laws can be applied to interactive computer service providers. (The definition of interactive computer service providers includes websites, such as social

media. 47 U.S.C. § 230(f)(2)). Section 230(c)(1) does so by establishing for certain practices by those companies a special federal affirmative defense to claims under other laws. Practices protected by that affirmative defense occupy a legal "no man's land," where internet companies are largely free from legal constraints, and where they often can engage with impunity in practices which would be actionable if undertaken by any non-internet firm. The importance of the boundaries of the section 230(c)(1) defense has grown exponentially as interactions which once occurred in person have increasingly moved online, and as new forms of abuse unique to the internet age—such as cybercrime, trolling, and revenge porn—have emerged.

Despite its enormous importance, section 230(c)(1), speaks neither in detail nor with any precision. Rather, like section 1 of the Sherman Act, section 230(c)(1) is written in broad generalities, and courts have been left to develop more specific meanings in light of emerging economic and technical developments.

> Section 230's simplicity is one of its greatest strengths. Other U.S. laws ... occupy hundreds of pages in the United States Code and require teams of specialized lawyers to parse. Section 230, on the other hand, packs most of its punch in twenty-six words and contains few exceptions or caveats. But its brevity also has left room for some courts to set important limits on the scope of its immunity.... The text of Section 230 does not provide many answers. Courts are left to rely on competing

> dictionary definitions and commonsense interpretations....

Koseff, 167-68.

In the absence of more detailed congressional language, for "two decades ... courts[ ] [have] struggle[d] to apply the law in tough cases." *Id.* at 6. The lower courts, unsurprisingly, have disagreed about the basic legal standards established by section 230(c)(1). In some cases, the differences among those standards have not mattered; all circuits agree, for example, that an internet company would not be liable for merely creating a bulletin board or chat room, or for permitting a third party to post statements that proved to be defamatory. But as internet companies have expanded beyond the bulletin boards and chat rooms that were more common a generation ago, and have increasingly provided additional services and sought to attract greater usage, cases have arisen in which those differences in standards are of controlling importance. The controversies in this instant case, and in the companion petition in *Dyroff v. The Ultimate Software Group*, No. 19-___, illustrate the circumstances in which those circuit differences are dispositive.

STATEMENT OF THE CASE

Historical and Legal Background

The Communications Decency Act of 1996 ("CDA") was adopted in particular response to the danger that the then emerging Internet would lead to the

transmission of sexually explicit materials and solicitations to minors. The nature of the Internet and the increasing pervasiveness of computers made it difficult for parents to control the materials to which their children had access, at home or elsewhere. Congress sought to address that problem in two distinct ways, only one of which is relevant here.

Congress attempted to limit directly the degree to which sexually explicit materials would be sent over the Internet, by adopting two criminal provisions forbidding the knowing transmission of obscene or sexually explicit materials or messages to any person under 18 years of age. 47 U.S.C. §§ 223(a), 223(d). This Court held those prohibitions violated the First Amendment. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

The CDA also sought to enable and encourage internet companies to take voluntary action to protect children from exposure to sexually inappropriate matters. That purpose was embodied in section 230, entitled "Protection for private blocking and screening of offensive material." Section 230(c)(2) achieved this most directly, by providing that an interactive computer service provider (such as a website) could not be held liable because of voluntary action to limit or bar access to such offensive material. 47 U.S.C. § 230(c)(2).

Section 230(c)(1), the specific provision at issue here, was enacted to deal with a very specific legal problem that was already facing interactive computer service providers which might seek to limit the

material displayed on their websites or through their services. The ability of interactive computer service providers to restrict access to offensive material was seriously threatened by the decision in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995). There Prodigy had attempted to affirmatively screen for offensive language and insulting remarks the bulletin board postings that were displayed on its website. 1995 WL 323710 at *2. Prodigy's efforts to limit the content on its bulletin boards, the court held, rendered it a publisher rather than merely a distributor under defamation law, and thus strictly liable for any defamatory material posted on its website. *Id*. at *5.

Congress immediately recognized that this same principle of defamation law would deter interactive computer service providers from attempting to remove offensive materials from their websites. Even if, under section 230(c)(2), an interactive computer services provider could not be held liable by a user that sought, unsuccessfully, to post offensive material, a provider's efforts to do so would likely to render it a publisher for defamation purposes as to all other users. Thus, providers would be likely to refrain from limiting sexually offensive materials to avoid defamation liability for matters unrelated to obscenity.

Congress directly addressed this problem in the twenty-six words of section 230(c)(1): "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Under

section 230(c)(1), so long as the allegedly defamatory material at issue had been created solely by a third party, an interactive computer service provider could not be treated as a publisher for defamation purposes, even if, like the defendant in *Stratton Oakmont*, the provider did exercise control over the content of some other third-party material.

Although section 230(c)(1) was adopted to deal in particular with a specific problem in defamation law, the terms "defamation" and "libel" do not appear in the text of or expressly limit the statute. Because section 230(e)(3) preempts any state or local law to which section 230(c)(1) applies, an interactive computer service provider which successfully invokes section 230(c)(1) can often obtain effective exemption from a law, potentially gaining a considerable financial benefit, including comparative advantage over its non-internet competitors. For that reason, interactive computer service providers have aggressively sought to invoke section 230(c)(1) as a defense to the application of state and local laws on subjects entirely unrelated to defamation, including taxes on scalper ticket prices,[1] regulation of local apartment-sharing Airbnb listings,[2] the obligation to warn users about dangerous products,[3] and

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[1] *City of Chicago, Illinois v. Stubhub!, Inc.*, 624 F.3d 363 (7th Cir. 2010).

[2] *Homeaway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019).

[3] *Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894 (2014).

responsibility for defective consumer products.[4] Countless commercial firms now have online computer capacity that renders them, at least for certain purposes, interactive computer service providers. Even more traditional interactive computer service providers, such as Facebook, today generate growing a wide range of programs and services over and above the traditional bulletin board or chat room.

Against this complex and ever evolving background of internet developments, two fundamental conflicts have arisen among the circuit courts regarding the meaning of section 230(c)(1).

Proceedings Below

The Complaint

This is an action under the Anti-Terrorism Act and the Justice Against Sponsors of Terrorism Act. 18 U.S.C. §§ 2331, 2339A, 2339B. The Anti-Terrorism Act forbids acts of terror against United States citizens anywhere in the world, and provides a private right of action for victims and their families. The Justice Against Sponsors of Terrorism Act extends that right of action to claims against any person or organization that knowingly provides material assistance to a terrorist organization. Plaintiffs bring this action against Facebook, alleging that it provided material assistance

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[4] *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 150-53 (3d Cir. 2019); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139-40 (4th Cir. 2019).

to Hamas, a well-known terrorist organization that has murdered or maimed many Americans.

Hamas is a terrorist organization in Gaza. The Secretary of State has officially designated Hamas (including Hamas's paramilitary *al-Qassam* Brigades) as a "Foreign Terrorist Organization" pursuant to Section 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189. 62 Fed. Reg. 52650 (1997). The Secretary of State has also officially designated Hamas (including its *al-Qassam* Brigades) as a Specially Designated Global Terrorist pursuant to Executive Order No. 13224. 67 Fed. Reg. 12633-12635 (2002). Those designations remain in effect to this day. Since it was formed in 1987, Hamas has conducted thousands of terrorist attacks against civilians in Israel. App. 4a.

Plaintiffs' complaint describes terrorist attacks by Hamas against five Americans in Israel between 2014 and 2016. Yaakov Naftali Fraenkel, a teenager, was kidnapped by a Hamas cell while traveling home from school in Gush Etzion, near Jerusalem, and then was shot to death. Chaya Zissel Braun, a 3-month-old baby, was killed at a train station in Jerusalem in 2014 when a Hamas operative drove a car into a crowd. Richard Lakin died after Hamas members shot and stabbed him in an attack on a bus in Jerusalem in 2015. Graduate student Taylor Force, a West Point graduate and a veteran of both Iraq and Afghanistan, was stabbed to death by a Hamas attacker while walking on the Jaffa boardwalk in Tel Aviv in 2016. Menachem Mendel Rivkin was stabbed in the neck in 2016 by a Hamas operative while walking to a restaurant in a town near

Jerusalem. He suffered serious injuries but survived. Except for Rivkin, plaintiffs are the representatives of the estates of those who died in these attacks and family members of the victims. App. 5a.

The complaint alleged that defendant Facebook provided material assistance to Hamas,[5] and did so with actual knowledge that Hamas was a terrorist organization. The complaint asserted that Facebook had provided Hamas with two fundamentally different types of material assistance, only one of which is at issue in this petition.

First, the complaint alleged that Facebook assisted Hamas by providing Hamas and its operatives with a communications platform, consisting of a Facebook page on which Hamas could post statements, photographs, videos and information about events. Facebook did not control the contents which Hamas chose to put on its Facebook page; Hamas personnel wrote the words it posted and selected or created each photograph and video uploaded. Hamas uploaded these directly onto its Facebook page, without seeking or needing comment by or permission from Facebook. The complaint faulted Facebook for permitting Hamas to upload its content, for failing to remove that content, and for permitting Hamas to have a Facebook page at all.

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[5] Like the court of appeals, we use "Hamas" to refer to individuals alleged to be Hamas members or supporters, as well as various Hamas entities that are alleged to have Facebook pages. App. 8a n. 4.

Second, and central to the instant petition, the complaint[6] alleged that Facebook itself had taken

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[6] The Amended Complaint states in part:

> 530. Facebook's computers execute algorithms which utilize the collected data to suggest friends, groups, products, services and local events, and target ads that will be "as relevant and interesting" as possible to each individual user. This enables Facebook to customize its services to the specific likes and interests of each of its users.
>
> 531. Effectively, Facebook serves as a broker or match-maker between like-minded people, introducing users to one another and to groups and events that they will be interested in based on the information in their user profiles and online activities.
>
> 532. Facebook's algorithms suggest friends based on such factors as friends of friends, group membership, geographic location, event attendance, language, etc. Thus, Facebook actively provides "friend suggestions" between users who have expressed similar interests (for example, by joining groups or "liking" posts with the themes HAMAS, the "Knife Intifada" or stabbing Jews).
>
> 533. Similarly, Facebook actively suggests groups and events to users who have "liked" or shared pages on particular subjects, joined similar groups, and/or attended similar events.
>
> 534. Facebook also actively encourages users to attend events related to their interests in their geographical area, by providing notifications of such events being attended by the user's "friends", group members or taking place in the user's vicinity.
>
> 535. These types of suggestions may appear in a user's newsfeed or on the side margins of the user's Facebook page. Each time a user logs in, Facebook also provides "notifications" about friend, group and event suggestions.

several affirmative steps of its own that materially assisted Hamas. Facebook had: (a) recommended to other Facebook users photographs, videos or statements that Hamas had posted on its Facebook page, (b) notified other Facebook users of events sponsored by Hamas, and (c) suggested to other Facebook users that they "friend" (Facebook's term for forming a link with another user) the Hamas Facebook page, all which would or could result in regular notifications from Facebook itself about Hamas statements and other content. Those recommendations, notifications and suggestions, the complaint asserted, were sent to individuals whom Facebook concluded, based on the extensive information it had about each of its 2.5 billon users, would be interested in Hamas and the activities of that terrorist organization. Those initiatives by Facebook, the complaint asserted, were based on computer algorithms analyzing extensive Facebook user data.

> After collecting mountains of data about each user's activity on and off its platform, Facebook unleashes its algorithms to generate friend, group, and event suggestions based on what it perceives to be the user's interests.... If a user posts about a Hamas attack or searches

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536. Facebook's algorithms also move posts that are likely to be of interest and garner "likes", shares, and comments, to the top of a user's newsfeed. So, for example, [a] Facebook user who has been vocal in supporting HAMAS or "Al Aqsa Intifada" will be alerted to such posts upon logging into Facebook.

537. In addition, when a Facebook user clicks on a video clip on Facebook, a box appears on the page recommending other similar videos.

> for information about a Hamas leader, Facebook may "suggest" that that user become friends with Hamas terrorists on Facebook or join Hamas-related Facebook groups.

App. 49a (dissenting opinion).

District Court

Facebook moved under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief may be granted, asserting that all of the plaintiffs' claims were barred by section 230(c)(1). That motion raised two distinct issues, related respectively to the two distinct types of claims that the complaint alleged.

First, regarding the claim that Facebook permitted Hamas to maintain a Facebook page and post materials onto its page, the defendant argued that because Hamas alone had created the material which it had posted, section 230(c)(1) precluded the imposition of liability on a Facebook for merely displaying material created by Hamas. The district court held that where such content has been created by another party, section 230(c)(1) immunizes an interactive computer service provider from liability for its decisions to permit such party to use its platform, and for decisions about what that other party may say on the platform. App. 141a-43a. Plaintiffs argued that section 230(c)(1) did not apply to their particular claims, because the terrorist attacks at issue had occurred outside the United States. The district court concluded, however, that

section 230(c)(1) applies to any litigation in any court within the United States, regardless of whether the underlying conduct might have occurred in another country. App. 144a-50a.

Second, the district court noted that the complaint further alleged that "Facebook generates targeted recommendations for each user promoting content, websites, ... users, groups and events that may appeal to a user based on their usage history." App. 115a-16a. The district court held that these recommendation activities by Facebook were immunized by section 230(c)(1) because they "implicate[d] [Facebook's] role, broadly defined, in publishing ... [Hamas's] third party [c]ommunications." App. 140a. The district judge reasoned that it would be "[i]n keeping with th[e] expansive view of the publisher's role [in] judicial decisions in this area" to deem the Facebook recommendations to be within the scope of its immunity for permitting Hamas to maintain a Facebook page. App. 140a. The court dismissed the complaint without prejudice. App. 151a.

The plaintiffs filed a motion to alter the judgment dismissing the complaint, and sought leave to file a second amended complaint. The district court reiterated its earlier determination that section 230(c)(1) applies, in any American court, to claims that arose outside the United States. App. 82a-85a. The district court again rejected as legally insufficient the plaintiff's "allegations that Facebook's networking algorithms recommend content to account holders." App. 104a. The district judge reasoned that, even though Facebook

itself had made those recommendations, the content which it had recommended had been created by Hamas. Facebook could not be held liable for having made those recommendations because they were "[b]ound up ... in the content that Hamas-affiliated users provide...." App. 105a. The district court therefore denied with prejudice the motion to amend the judgment and to file a second amended complaint. App. 112a.

Court of Appeals

The dismissal of the complaint was affirmed by a divided court of appeals. App. 3a-46a. Chief Judge Katzmann would have reinstated the complaint insofar as it asserted a claim against Facebook based on the defendant's "friend-and-content suggestion algorithms." App. 46a-71a.

Regarding plaintiffs' claim based solely on the fact that Facebook permitted Hamas to maintain and post materials on a Facebook page, the court of appeals unanimously held that section 230(c)(1) does apply to claims arising outside of the United States (App. 43a), and that the section 230(c)(1) defense is not precluded by the fact that the complaint alleged criminal conduct by Facebook. App. 35a-38a; *see* App. 46a n. 1 (dissenting opinion).

The Second Circuit, however, was sharply divided regarding whether section 230(c)(1) created a defense to plaintiffs' claim that Facebook itself had created and disseminated recommendations to Facebook users regarding matters on the Hamas Facebook page, and had

suggested that users "friend" Hamas or favor Hamas-sponsored events. In lengthy, well-reasoned opinions, the majority and dissenting opinions set out fundamentally different interpretations of section 230(c)(1), differences rooted in sharp conflicts that already existed among other courts of appeals.

Citing decisions in several circuits, the majority insisted that section 230(c)(1) "should be construed broadly in favor of immunity." App. 19a. The court of appeals asserted that this was the "majority" view, but did not claim that this interpretation of section 230(c)(1) was unanimous. App. 20a. Proceeding on that premise, the court concluded that section 230(c)(1) creates immunity for any of the activities in which a publisher might engage. App. 29a. The allegations that Facebook had taken a variety of steps to recommend Hamas materials to Facebook users, the majority insisted, did "not describe anything more than Facebook vigorously fulfilling its role as a publisher." App. 34a. The court held that an interactive computer service provider such as Facebook is immunized by section 230(c)(1) if it arranges "a connection between two [users] and facilitates the sharing of their [website content]," so long as it does so through an interactive computer service, rather than by a telephone call. App. 26a n. 23. The majority insisted that recommending to other users content posted by Hamas on a website was "publishing activity." *Id*.

In a vigorous dissenting opinion, Chief Judge Katzmann emphatically disagreed with the majority's interpretation of section 230(c)(1). Relying on a line of

precedent contrary to that cited by the majority, Judge Katzmann rejected the notion that section 230(c)(1) should be broadly construed. Specifically, he insisted that section 230(c)(1) "does not grant publishers [immunity] ... for the full range of activities in which they might engage." App. 59a. "[Section] 230 does not ... immuniz[e] defendants from liability stemming from any activity in which one thinks publishing companies commonly engage." App. 58a. Rather, he insisted, section 230(c)(1) protects only the "exercise of a publisher's traditional *editorial* functions—such as deciding whether to publish, withdraw, postpone or alter content" provided by another for publication. App. 59a (emphasis added) (quoting *Federal Trade Commission v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016)). Section 230(c)(1) did not apply to Facebook's friend and content recommendations, Judge Katzmann insisted, because Facebook "uses the algorithms to create and communicate *its own message*: that it thinks you, the reader—you, specifically—will like this content." App. 60a (emphasis added); *see* App. 62a ("Facebook is telling users ... that they would like these people, groups, or events."). The alleged recommendations to users were messages from Facebook itself, not, for example, messages from Hamas.

Unlike the majority, Judge Katzmann insisted that a court should carefully distinguish between Facebook's action when it merely permitted Hamas to post content on its Facebook page (which was protected by section 230(c)(1)), and Facebook's action when it

went further and recommended Hamas (as a "friend"), and its Facebook page, content to other Facebook users.

> The fact that Facebook also publishes third-party content should not cause us to conflate its two separate roles with respect to its users and their information. Facebook may be immune under the CDA from plaintiffs' challenge to its allowance of Hamas accounts, since Facebook acts solely as the publisher of the Hamas users' content. That does not mean, though, that it is also immune when it conducts statistical analyses of that information and delivers a message based on those analyses.

App. 62a-63a.

Plaintiffs filed a petition for rehearing and rehearing *en banc*. The court of appeals denied the petition on August 29, 2019.

REASONS FOR GRANTING THE WRIT

There are two deeply entrenched and fundamental conflicts among the circuits regarding the meaning of section 230(c)(1). The courts of appeals disagree not only about when section 230(c)(1) bars liability, but also about what type of defense it is.

I. There Is A Conflict Regarding Whether Section 230(c)(1) Creates A Broad Immunity Or Only Limits The Definition of "Publisher" Under Certain Other Laws

The courts of appeals are divided as to whether (as the Second Circuit held) section 230(c)(1) creates a form of general immunity applicable to all possible civil claims, or only precludes (in certain circumstances) treating interactive computer service providers as "publishers" with regard to claims that specifically require a plaintiff to establish that the defendant *is* a publisher. The scope of the resultant defense is considerably different.

A majority of the courts of appeals hold that section 230(c)(1) creates a species of immunity, which applies to any interactive computer service provider that acts as a "publisher," so long as it is publishing content created by another. On this view, the immunity turns on the nature of the defendant's conduct, and if available would apply to all types of claims. Whether this immunity exists depends on whether a defendant can show it was acting as a publisher. That interpretation was applied by the Second Circuit in the instant case, and by the Ninth Circuit in *Dyroff v. The Ultimate Software Group*, 934 F.3d 1093 (9th Cir. 2019), but it has been repeatedly rejected by the Seventh Circuit.

The view that section 230(c)(1) creates a form of immunity for publishers originated in the Fourth Circuit decision in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

> §230 creates federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, §230 precludes courts from entertaining claims that would palace a computer service provider in a publisher's role....

129 F.3d at 330.

Several other circuits have also held that section 230(c)(1) creates a form of immunity for publishers, although differing as to when an interactive computer service provider is acting as a "publisher" for the purposes of the Act. App. 19a (Second Circuit); *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007) ("section 230 immunity"); *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) ("[b]y its terms, § 230 provides immunity to ... a publisher ... of information originating from another information content provider"); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) ("Congress provided broad immunity under [section 230] to Web-based service providers for all claims stemming from their publication of information created by third parties ... "); *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 406-07 (6th Cir. 2014) ("Section 230 ... immunizes providers of interactive computer services against liability arising from content created by third parties"); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (quoting *Almeida*); *Fair Housing Council of San Francisco Valley v. Roommates.com LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) ("Section 230 ...

immunizes providers of interactive computer services against liability arising from content created by third parties"); *Ben Ezra, Weinstein, and Co., Inc. v. America Online Inc.*, 206 F.3d 980 984-85 (10th Cir. 2000) ("§230 creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party"); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted [section 230] to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.' ") (*quoting Zeran*); *Marshall's Locksmith Service Inc. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019) ("§230 immunizes internet services for third-party content that they publish ... against causes of actions of all kinds.").

The Seventh Circuit, on the other hand, has repeatedly insisted that section 230(c)(1) should be construed very differently. The Seventh Circuit holds that section 230(c)(1) does not create a form of immunity at all, and that the defense provided by section 230(c)(1) is limited to claims which require a plaintiff to show that the defendant was a publisher. Section 230(c)(1) creates that defense, the Seventh Circuit holds, by defining "publisher" to exclude certain such providers. Rejecting the majority view that section 230(c)(1) precludes liability for certain interactive computer services because they *are* publishers, the Seventh Circuit holds that under section 230(c)(1) certain interactive

computer services are not liable because they may *not* be deemed publishers, a literal reading of the statute.

In *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003), the Seventh Circuit first indicated its view that section 230(c)(1) is "a definition rather than ... an immunity." 347 F.3d at 659. The district court in that case had treated section 230 as creating an immunity, which the Seventh Circuit noted "has the support of four circuits." 347 F.3d at 659-60. But such a broad interpretation of section 230(c)(1), the Seventh Circuit reasoned, created an incentive for interactive computer services "to do nothing about the distribution of indecent and offensive materials via their services." 347 F.3d at 660. That interpretation seemed to the Seventh Circuit inconsistent with the caption of the statute, "Protection of 'Good Samaritan' blocking and screening of offensive material." *Id*. That caption was "hardly an apt description" of the Fourth Circuit's interpretation in *Zeran*. "Why should a law designed to eliminate [interactive service providers'] liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?" The more plausible interpretation of section 230(c)(1), the Seventh Circuit reasoned, was as a definition limiting who is a publisher, and thus as a defense that only "forecloses ... liability that depends on deeming the [interactive computer service provider] a 'publisher'—defamation law would be a good example of such liability...." *Id*.

In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008), the Seventh Circuit squarely rejected *Zeran* and similar decisions.

> As [C]raigslist understands this statute, § 230(c)(1) provides "broad immunity from liability for unlawful third-party content." That view has support in other circuits. See *Zeran*.... We have questioned whether § 230(c)(1) creates any form of "immunity," see *Doe v. GTE Corp*. ... [Craiglist's] argument [does not] find[ ] much support in the statutory text. Subsection (c)(1) does not mention "immunity" or any synonym. Our opinion in *Doe* explains why § 230(c)(1) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts....

519 F.3d at 668.

> To appreciate the limited role of § 230(c)(1), remember that "information content providers" may be liable for contributory infringement if their system is designed to help people steal music or other material in copyright.... *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) ... is incompatible with treating § 230(c)(1) as a grant of comprehensive immunity from civil liability for content provided by a third party.... [C]raigslist wants to expand § 230(c)(1) beyond its language....

519 F.3d at 670. Utilizing this narrower interpretation of section 230(c)(1), the Seventh Circuit held that the provision's limiting definition applied in that case only because the specific statute on which the lawsuit was based (like a defamation claim) expressly made publication an element of the underlying claim; "only in a capacity as publisher could [C]raigslist be liable...." *Id*. at 671.

In *City of Chicago, Illinois v. Stubhub!, Inc.*, 624 F.3d 363 (7th Cir. 2010), the Seventh Circuit reiterated its holding that section 230(c)(1) does not create a form of immunity, and can only be invoked as a bar to claims which require a showing of publication.

> As earlier decisions in this circuit establish, subsection (c)(1) does not create an "immunity" of any kind.... It limits who may be called the publisher of information that appears online. That might matter to liability for defamation, obscenity, or copyright infringement. But Chicago's amusement tax does not depend on who "publishes" any information or is a "speaker." Section 230(c) is irrelevant.

624 F.3d at 366. In *Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016), the Seventh Circuit again made clear that section 230(c)(1) potentially limits only claims that require a showing of publication, and does so by precluding certain interactive service providers from being treated as publishers. "[Section 230(c)(1)] means that for purposes of defamation and other related theories of liability, a company ... cannot be considered the publisher of information simply because the company

hosts an online forum for third-party users to submit comments." 841 F.3d at 741.

The circuit split is well recognized. The Seventh Circuit itself expressly rejected the interpretation of the Fourth and several other circuits in *Chicago Lawyers Committee*, having earlier questioned those conflicting interpretations in *Doe v. GTE Corporation*. The Eleventh Circuit described the circuit conflict in *Almeida v. Amazon.com*, 456 F.3d 1316, 1321 (11th Cir. 2006).

> The majority of federal circuits have interpreted [section 230(c)(1)] to establish broad "federal immunity...." ... In contrast, the Seventh Circuit determined that [section 230(c)(1)] is not necessarily inconsistent with state laws that create liability for interactive service providers that refrain from filtering or censoring content.

456 F.3d at 1321 n. 3 (*quoting* the Fourth Circuit decision in *Zeran* and *citing* the Seventh Circuit decision in *Doe v. GTE Corp.*). The Fourth Circuit has expressly rejected the Seventh Circuit interpretation of section 230(c)(1).

> There is some disagreement as to whether the statutory bar under § 230 is an immunity or some less particular form of defense for an interactive computer service provider. The Seventh Circuit, for example, prefers to read "§ 230(c)(1) as a definitional clause rather than as an immunity from liability." *Doe v. GTE Corp*., 347 F.3d [at] 660 ... ; *see also* [*Chicago Lawyers' Committee for Civil Rights v*.] *Craigslist, Inc.*, 519 F.3d at 669.... [O]ur

> Circuit clearly views the § 230 provision as an immunity....

Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Ind., 591 F.3d 250, 254 n. 4 (4th Cir. 2009).

Several federal district courts have described the conflict.

> Craigslist contends that § 230(c)(1) "broadly immunizes providers of interactive computer services from liability for the dissemination of third-party content." *See, e.g.*, *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). That appears to be the majority view, ... but our Court of Appeals has not adopted it.

Dart v. Craigslist, 665 F.Supp.2d 961, 965-66 (E.D.Ill. 2009) (citing *Doe v. GTE Corporation* and *Chicago Lawyers' Committee*).

> Some courts characterize the "protection" of § 230(c)(1) as "a broad immunity," but this view is not universal. *Compare*, *e.g.*, *Nemet Chevrolet, Ltd. v. Consumeraffirs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) *with Chicago Lawyers' Committee for Rights under Law, Inc. v. Craigslist*, 519 F.3d 666, 669 (7th Cir. 2008).

Florida Abolitionist v. Backpage.com LLC, 2018 WL 1587477 at *4 (M.D.Fla. March 31, 2018); *see Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F.Supp.2d 681, 689-90 (N.D.Ill. 2006), *aff'd*, 519 F.3d 666 (7th Cir. 2008) ("several courts

have [followed *Zeran* and] concluded that Section 230(c) offers [interactive computer services providers] a "broad," "robust" immunity. In *Doe v. GTE Corp*., 347 F.3d 655, 659-70 (7th Cir. 2003), however, the Seventh Circuit called *Zeran*'s holdings into doubt.").

State courts have also recognized this disagreement among the federal courts of appeals.

> Defendant contends that subsection 230(c)(1) ... grants an [interactive computer service] provider broad immunity from any potential liability that is derived from content posted on or transmitted over the Internet by a third party. Defendant's contention has support in other state courts and federal circuits [citing decisions in the First, Fourth, Ninth and Tenth Circuits].... Other courts, however, disagree with or question the proposition that subsection 230(c)(1) provides such broad immunity from liability deriving from third-party content. [citing Seventh Circuit decisions].... We agree with the analysis of the Seventh Circuit that section 230(c)(1) "as a whole cannot be understood as granting blanket immunity to a[] ... provider from any civil cause of action that involves content posted on or transmitted over the Internet by a third party. *Craigslist, Inc*., 519 F.3d at 669, 671.

Lansing v. Southwest Airlines Co., 2012 Ill.App. (1st) 101, 104, 980 N.E.2d 630, 637-38 (App.Ct.Ill. 1st Dist. 2012).

> [T]he federal Fourth Circuit Court of Appeals in *Zeran* ... noted that § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.... Other courts have adopted this broad reading of the protections afforded by Section 230 [citing decisions in the First, Third, Fifth, Ninth and Tenth circuits] ... [Other] courts ... have not interpreted Section 230(c)'s protection as broadly as the Fourth Circuit in *Zeran ... Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.* ....

Miller v. Federal Express Corp., 6 N.E.3d 1006, 1016 (Ct.App.Ind. 2014); *see Daniel v. Armslist, LLC*, 382 Wis.2d 241, 255 n. 5 (Ct.App. 2018), *rev'd on other grounds*, 386 Wis.2d 449 (2019) ("At least one court has questioned whether it is appropriate to use the term 'immunity' in connection with the Act.") (citing *Chicago Lawyers' Committee*); *J.S. v. Village Voice Media Holdings*, 184 Wash.2d 95, 109, 359 P.3d 714, 714 (2015) (Madsen, J., concurring) (disagreeing with the "many courts" that have held that section 230 provides "broad immunity," and relying on the contrary authority in the Seventh Circuit opinion in *Chicago Lawyers' Committee*), 184 Wash. at 121-22, 359 P.2d at 727 and nn. 18-19 (McCloud, J., dissenting) ("Most courts characterize subsection 230(c)(1)'s language ... as providing "immunity" from suit. A few courts say that this language creates protection from suit, rather than an absolute immunity.") (contrasting language in decisions

in the Fourth, Sixth, Eighth and Eleventh Circuits with language in a Seventh Circuit decision).

Commentators have called for a "resolution of this circuit conflict." Comment, "Plumbing the Depths" of the CDA: Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity Under Section 230 of the Communications Decency Act, 20 Geo. Mason L. Rev. 275, 298 (2012).

> The *Zeran* standard is the one most commonly upheld nationwide, with other circuits—notably the First, Third, and Tenth—widely embracing the Fourth Circuit's reading of Section 230(c)(1). The Seventh Circuit, after its opinion in *Craigslist*, has departed definitively from the broad reading of Section 230(c)(1)....

20 Geo. Mason at 292 (footnotes omitted).

> In *Craigslist* ... [the court] referenced [the] *GTE Corp*. decision and explicitly challenged the *Zeran*-derived interpretation of Section 230 advocated by Craigslist. According to the Seventh Circuit, the application of the *Zeran* standard was precluded in *Craigslist* by the Supreme Court's decision in *Metro-Goldwyn-Mayer Studios, Inc v. Grokster, Ltd.* ....

Id. at 295; *see id.* at 298 ("The Fourth Circuit flatly rejected the Seventh Circuit's analysis in 2009 in *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Ind*.") (footnote omitted). "Since the enactment of § 230, some courts have taken an expansive view of the immunity that the statute affords to interactive computer services. Other

courts have more narrowly construed the terms of § 230, limiting the scope of its protections." Note, As Justice So Requires: Making The Case For A Limited Reading of § 230 of the Communications Decency Act, 86 Geo. Wash. L. Rev. 257, 267 (2018) (footnote omitted); *compare id.* at 268-69 (citing decisions in the Fourth and Sixth Circuits) *with id*. at 272 (citing decision in the Seventh Circuit); *see* Brief in Opposition of Respondents MySpace, Inc. and News Corp., *Doe v. MySpace, Inc.*, No. 08-340, 2008 WL 4650528 at *10 (labeling the Seventh Circuit standard an "outlier").

II. There Is A Conflict Regarding The Meaning of The Term "Publisher" In Section 230(c)(1)

As the conflicting opinions in the Second Circuit below make abundantly clear, among the circuits (outside the Seventh) which hold that section 230(c)(1) creates a form of immunity, a further sharp division exists regarding what types of activities by an interactive computer service provider render it (in that regard) a "publisher." One group of circuits, like the majority below, accord that immunity to any activity in which a firm in the publishing business might engage; this interpretation of publisher, and the resulting immunity, is avowedly "broad." Other circuits hold, to the contrary, that under section 230(c)(1) "publish[ing]," and thus immunity, are limited to core *editorial* functions, primarily deciding what third-party content to accept and reject. A provider (like Facebook) which engages in a non-editorial activity related to some

third-party content would not be entitled to immunity in the latter circuits, but could (as here) be entitled to immunity in the former.

The majority below insisted that section 230(c)(1) provides "broad immunity" for conduct related to publication of third-party content, and quoted to that effect decisions from the Fifth, Ninth, Eleventh, and District of Columbia Circuits. App. 20a (quoting *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) ("Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content."); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) ("§ 230(c) provides broad immunity for publishing content provided primarily by third parties."); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted [Section 230] to establish broad ... immunity."); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019) ("Congress inten[ded] to confer broad immunity for the re-publication of third-party content.")).

Relying on that principle of broad immunity, the Second Circuit majority held that the protections afforded by section 230(c)(1) are as all-encompassing as the widely varying practices of the publishing industry.

> Certain important terms are left undefined by Section 230(c)(1), including "publisher." 47 U.S.C. § 230(c)(1). This Circuit and others have generally looked to that term's ordinary meaning: "one that makes public," *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir.

> 2014) (citing Webster's Third New International Dictionary 1837 (1981)); "the reproducer of a work intended for public consumption," *LeadClick*, 838 F.3d at 175 (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (quoting Webster's Third New International Dictionary 1837 (Philip Babcock Gove ed., 1986))); and "one whose business is publication[.]" [I]d.

App. 21a-22a. On the Second Circuit's view, once an interactive computer service provider publishes the content of a third party, the provider enjoys immunity to take whatever other types of related actions it might conceivably engage in as part of its "business [of] publication."

Applying that broad definition of a publisher as "one whose business is publication," the court of appeals concluded that Facebook was protected by section 230(c)(1) when it furthered its business interests by recommending to other Facebook users material on the Facebook page of (or about) Hamas.

> Plaintiffs ... argue that Facebook's algorithms ... make[s] th[e] content [of Hamas's Facebook page] more "visible," "available" and "usable." Appellant's Br. at 45-46. But making information more available is, again, an essential part of traditional publishing.... Similarly, plaintiffs assert that Facebook's algorithms suggest third-party content to users "based on what Facebook believes will cause the user to use Facebook as much as possible" and that Facebook intends to "influence" consumers'

> responses to that content. Appellants' Br. 48. This does not describe anything more than Facebook vigorously *fulfilling its role as a publisher*.

App. 34a (emphasis added). The breadth of the Second Circuit rule is demonstrated by its insistence that section 230(c)(1) would immunize an interactive computer service provider which, through the Internet, "brokers a connection between two published authors and facilitates the sharing of their works." App. 26a n. 23.

Applying that same broad interpretation of "publisher," the Ninth Circuit in *Dyroff v. The Ultimate Software Group*, 934 F.3d 1093, 1098 (9th Cir. 2019), reasoned that "by recommending user groups and sending email notifications, Ultimate Software, through its Experience Project website, was acting as a publisher of others' content." That is consistent with the district court's view in the instant case that section 230(c)(1) immunizes "a defendant's role, broadly defined, in publishing ... third party [c]ommunications." App. 140a.

Chief Judge Katzmann, on the other hand, pointed to a very different line of circuit court decisions, which establish a substantially narrower definition of "publisher" and form of immunity.

> [P]recedent does *not* grant publishers CDA immunity for the full range of activities in which they might engage. Rather, it "bars lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to

> publish, withdraw, postpone or alter content" provided by another for publication.

App. 59a (emphasis added) (quoting *Federal Trade Commission v. LeadClick Media, LLC*, 838 F.3d at 174). The dissent noted that this narrower interpretation of section 230(c), limiting publisher immunity to the decisions "to publish, withdraw, postpone or alter content," is endorsed by decisions in the Third, Fourth, Sixth and Tenth Circuits. App. 59a (citing *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 151 (3d Cir. 2019); *Zeran*, 129 F.3d at 330; *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000)).

Under this narrower interpretation of section 230(c)(1), Judge Katzmann explained,

> § 230(c)(1) does not necessarily immunize defendants from claims based on promoting content ... , even if those activities might be common among publishing companies nowadays. A publisher might write an email promoting a third-party event to its readers, for example, but the publisher would be the author of the underlying content and therefore not immune from suit based on that promotion.

App. 58a-59a.

> [A] claim against a newspaper based on the content of a classified ad (or the decision to publish or withdraw that ad) would fail under [section 230(c) *not* because newspapers

> *traditionally publish* classified ads, but rather because such a claim would necessarily treat the newspaper as the publisher of the ad-maker's content.... [T]he newspaper does not act as an "information content provider"—and thus maintains its [section 230(c)] protection—when it decides to run a classified ad because it neither "creates" nor "develops" the information in the ad.

App. 60a (emphasis added). Indeed, Chief Judge Katzmann correctly pointed out, the recommendation actions for which Facebook was claiming immunity would not be characterized as "publishing" in common parlance. App. 48a.

In *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003), the Third Circuit set out this narrower editorial function standard.

> By its terms, § 230 ... "precludes courts from entertaining claims that would place a computer service provider in a publisher's role," and therefore bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content." ... Green ... attempts to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role.

(Internal quotations omitted). In *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010), the Eighth Circuit applied the identical standard.

> § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.

The Tenth Circuit interprets section 230(c)(1) in the same way.

> Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory function.... By deleting [certain disputed information], Defendant was simply engaging in the editorial functions Congress sought to protect.

Ben Ezra, Weinstein, and Company, Inc. v. America Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000). Several Sixth Circuit decisions utilize that editorial function test. *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 416 (6th Cir. 2014) ("[section 230(c)] expressly bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.") (quoting *Zeran*); *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016). The New York Court of Appeals applied this interpretation of section 230(c)(1) in *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 291-92 (2011).

There is an obvious and critical difference between immunizing only traditional editorial functions, such as the decision whether to accept or remove a third-party submission, and more broadly immunizing any activity that could fall within the "business [of] publication." Publishers often recommend their publications, such as through advertisements in newspapers and magazines. But that is not an editorial function. Nor is it a function limited to publishers; bookstores, good friends and best sellers lists also recommend publications. Publishers sometimes suggest that people attend events, such as book signings; but, of course, neighborhood book clubs also solicit attendance at book-related events. Publishers may seek to invite others to like their authors (in general terms, or on Facebook), in the hopes of eliciting more sales in the future; but sometimes agents or even spouses of authors do the same thing.

III. This Case Is An Excellent Vehicle for Deciding The Exceptionally Important Questions Presented

This case presents an excellent vehicle for resolving these important conflicts.

The conflict between the Seventh Circuit "definition" interpretation of section 230(c)(1), and the majority (and Second Circuit) "immunity" interpretation, would be dispositive in the instant case. Unlike in a defamation action, proof that the defendant was a "publisher" is not an element of a claim under the

Anti-Terrorism Act or the Justice Against Sponsors of Terrorism Act. The section 230(c)(1) defense successfully asserted in this case thus would not be available in the Seventh Circuit

Similarly, the circuit conflict regarding the meaning of "publisher" in section 230(c)(1), reflected in the warring opinions of the majority and dissent in the court below, would be dispositive here as well. Under the majority's interpretation of "publisher," Facebook was acting as a publisher of Hamas's material when it recommended to Facebook users content, photographs or videos from, or events related to, a Hamas page, as it was when it recommended to those users that they "friend" a Hamas Facebook page, and Facebook thus was entitled to immunity for all those recommendations. Clearly, on the other hand, making such recommendations is not a traditional editorial function. The section 230(c)(1) defense applied by the court below thus could not be invoked in any of the circuits that use the narrower "editorial function" standard.

There is, as Chief Judge Katzmann emphasized, substantial evidence that Facebook's friend and content recommendation features are contributing to the spread of support for terrorism of various strains.

> As plaintiffs allege, [Facebook's] friend-suggestion algorithm appears to connect terrorist sympathizers with pinpoint precision. For instance, while two researchers were studying Islamic State ("IS") activity on Facebook, one "received dozens of pro-IS accounts as recommended friends after friending just

> one pro-IS account." ... More disturbingly, the other "received an influx of Philippines-based IS supporters and fighters as recommended friends after liking several non-extremist news pages about Marawi and the Philippines during IS's capture of the city." ... [Other] [n]ews reports indicate that the friend-suggestion feature has introduced thousands of IS sympathizers to one another.

App. 68a. The consequences of construing section 230(c)(1) to immunize these dangerous practices are far too serious to permit that interpretation to continue without careful examination by this Court.

The tragic circumstances of this case make all too clear that the practical implications of the questions presented are extraordinarily important. Social media today reaches into the homes, offices and lives of billions of people, with potential for harm—and good—without parallel in human history. The complaint alleges that Facebook suggested that its users "friend" Hamas, an avowed terrorist organization, and recommended videos, photographs, events and other materials advancing Hamas's murderous schemes. In seeking to hold Facebook accountable for the consequences of those actions, plaintiffs do not ask this Court to create any new or novel substantive obligations, but urge only that the Court hold that section 230(c)(1) creates no defense to claims under independently existing laws. That the underlying statutes which plaintiffs seek to enforce are the Anti-Terrorism Act and the Justice Against Sponsors of Terrorism Act, and that the

Hamas attacks at issue resulted in the deaths of four Americans, and grievous injury to another, are compelling evidence that a grant of certiorari in this case would be an amply justified use of this Court's time and resources.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit. The case should be consolidated for oral argument with *Dyroff v. The Ultimate Software Group*, No. 19-___.

Respectfully submitted,

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